

OREGON CEDAR PRODUCTS CO.

IBLA 88-637

Decided April 9, 1991

Appeal from decisions of the Oregon State Office, denying protests against Eagle Rock Land Exchange OR 44047.

Appeal dismissed.

1. Appeals: Generally--Rules of Practice: Appeals: Dismissal

An appeal is properly dismissed as moot if, as a result of events occurring after the appeal is filed, there is no effective relief which the Board can afford the appellant and no reasonable expectation or demonstrated probability that the same controversy will again occur involving the same complaining party. Where an appeal was taken in reliance on a provision of law appearing in an annual appropriations act prohibiting export of unprocessed timber from Federal lands, but the provision appearing in the appropriations act was later replaced by a more detailed statute, the probability the same controversy will be repeated is slight.

APPEARANCES: James L. Hershner, Esq., Eugene, Oregon, for appellant Oregon Cedar Products Company; Roger Nesbitt, Esq., U.S. Department of the Interior, Office of the Regional Solicitor, for the Bureau of Land Management; David Brewer, Esq., Eugene, Oregon, for Murphy Sales Company.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

Oregon Cedar Products Company (Oregon Cedar) appeals from decisions of the Oregon State Office, Bureau of Land Management (BLM), dated July 21 and August 4, 1988, denying Oregon Cedar's July 11 and 22, 1988, protests against the Eagle Rock Land Exchange OR 44047, between BLM and Murphy Sales Company (Murphy Sales). ^{1/} The Notice of Realty Action for the Eagle Rock exchange was published in the Federal Register (53 FR 12476) on April 14, 1988. A Statement of Intent to Complete Land Exchange was executed by BLM and Murphy Sales on June 15, 1988. Oregon Cedar protested, arguing that the exchange violated a congressional mandate that no part of any appropriation for the Department of the Interior would be used to process a sale of

1/ Two decisions were rendered before it became apparent that the same protestant had made both protests.

unprocessed timber from Federal land for export. After its protests of the exchange were denied by BLM, Oregon Cedar filed this appeal.

Because the pending appeal was a barrier to the exchange process, a request was filed on August 12, 1988, by counsel for BLM, agreed to by Oregon Cedar, addressed to the Director, Office of Hearings and Appeals, to place the decision into full force and effect. The request stated, pertinently:

The protestor, Oregon Cedar Products Co. acquiesces in this request and [willingly] stipulates, by the signature of its legal counsel below, that it is in the public interest to place the protested decision into immediate full force and effect.

The basis of the protestor's objection is its argument that the timber on the lands being conveyed to Murphy Sales Co. should not be available for export because of the prohibition against export of timber from federal lands which has been included in every appropriation act since 1973. See P.L. 93-121, 87 Stat. 429, at 447. The protestor does not object to the acquisition of the Eagle Rock property by the BLM through a land exchange. The protestor has no interest in thwarting the BLM's efforts to protect the scenic values of the county park located across the McKenzie River from Eagle Rock. The protestor's only interest is restricting the use Murphy Sales Co. could make of the lands it would obtain from the BLM in this exchange and [to] establish a precedent that the appropriation act export prohibition applies

had intended to log the Eagle Rock property this summer and sell the timber in the export market. Whether that timber comes from the Eagle Rock property or the land obtained from the BLM makes little difference to the company. However, a delay in obtaining timber for export sale becomes critical for Murphy, if such a delay extends beyond the middle of August. Thus the Murphy company is considering withdrawing from the exchange if such a delay occurs and proceed [sic] with the harvest of timber on the Eagle Rock property. This would have a seriously deleterious impact on the scenic values BLM has sought to protect through its efforts to acquire the property.

(Request dated Aug. 8, 1988). The BLM decision to exchange with Murphy Sales was placed into full force and effect on August 12, 1988, by the Director. The record indicates that, pursuant to the exchange agreement, patent No. 36-88-0019 and a quit-claim deed were issued to Murphy Sales on August 17, 1988, followed by a warranty deed of the Eagle Rock property to the United States executed on August 25, 1988.

By order dated November 13, 1990, the Board inquired about the status of the timber harvest on the lands acquired by Murphy Sales in the exchange and permitted comment concerning other relevant matters. The response received was:

The Murphy Sales Company has harvested the timber on all of the lands conveyed to the company from the BLM in the exchange which is the subject of this appeal. The company informed us that a portion of the timber harvested was exported, but we do not know how much.

(BLM Status Report dated Dec. 21, 1990).

From 1973 through 1990, a prohibition against export of timber from Federal lands in the west was annually incorporated into the Appropriations Act for the Department. See, e.g., P.L. 100-202, Title III, § 302, 101 Stat. 1329-252 (Dec. 22, 1987). The Forest Resources Conservation and Shortage Relief Act of 1990 (FRCSRA), P.L. 101-382, Title IV, 104 Stat. 714, providing a permanent prohibition against sale of unprocessed timber from Federal land for export, was enacted by Congress on August 20, 1990. Where the appropriation act provisions were brief and unexplained, the new legislation is descriptive and detailed. 2/ Further, the prohibition against export sales appearing in the annual appropriations acts was

2/ Section 302 of the 1987 appropriations act, P.L. 100-202, Title III, 101 Stat. 1329-252 (Dec. 22, 1987), reads:

"No part of any appropriation under this Act shall be available to the Secretaries of the Interior and Agriculture for use for any sale hereafter made of unprocessed timber from Federal lands west of the 100th meridian in the contiguous 48 States which will be exported from the United States, or which will be used as a substitute for timber from private lands which is exported by the purchaser: Provided, That this limitation shall not apply to specific quantities of grades and species of timber which said Secretaries determine are surplus to domestic lumber and plywood manufacturing needs."

Portions of FRCSRA, relating to arguments made on appeal are:

"Sec. 488. Findings and Purposes. * * * (b) Purposes. -- The purposes of this title are -- * * * (4) to continue and refine the existing Federal policy of restricting the export of unprocessed timber harvested from Federal lands in the western United States.

"Sec. 489. * * * (a) Prohibition on Export of Unprocessed Timber Originating From Federal Lands. -- No person who acquires unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States may export such timber from the United States, or sell, trade, exchange, or otherwise convey such timber to any person for the purpose of exporting such timber from the United States unless such timber has been determined under subsection (b) to be surplus to the needs of timber manufacturing facilities in the United States.

"Sec. 490. * * * (a) Direct Substitution. -- (1) Except as provided in subsection (c), no person may purchase directly from any department or agency of the United States unprocessed timber originating from Federal lands west of the 100th meridian in the contiguous 48 States if -- (A) such processed timber is to be used in substitution for exported unprocessed timber originating from private lands; or (B) such person has, during the preceding 24-month period exported unprocessed timber originating from private lands.

directed at activities performed with Federal funds, while the new act prohibits any person who "acquires" unprocessed western Federal timber from exporting it. Specific sanctions and remedies are set forth in the new act for enforcement of the export prohibition.

The parties have agreed that Oregon Cedar has standing to appeal: their arguments address the substantive question whether the exchange between BLM and Murphy Sales was actually a timber sale within the prohibition of the 1987 appropriations act. Oregon Cedar acknowledges that the transaction has been completed and that the legal circumstances have changed with the enactment of FRCSRA, but argues nonetheless that "[t]he issue raised in this appeal remains vital because Congress has continued the [export] prohibition, although with different language, in the New Act" (Supplemental Statement of Reasons at 1).

[1] Ordinarily, an appeal must be dismissed as moot where, as a result of events occurring after the appeal is filed, there is no effective relief the Board can give an appellant. In Re Jamison Cove Fire Salvage Timber Sale, 114 IBLA 51, 53 (1990); The Hopi Tribe v. OSMRE, 109 IBLA 374, 381 (1989). In practice, the Board decides actual controversies and avoids giving opinions on moot questions or abstract propositions. Headwaters, 101 IBLA 234 (1988); State of Alaska, 85 IBLA 170, 172 (1985).

The timber on the lands which passed in exchange from BLM to Murphy Sales has been harvested and sold. The Board certainly cannot extend its authority to oversee or restrict handling of the harvested timber that

fn. 2 (continued)

"Sec. 492. * * * (a) Monitoring and Reports. -- In accordance with regulations issued under this section -- (1) each person who acquires, either directly or indirectly, unprocessed timber originating from Federal land west of the 100th meridian in the contiguous 48 States shall report the receipt and disposition of such timber to the Secretary concerned * * *; and (2) each person who transfers to another person unprocessed timber * * * shall, before completing such transfer [provide copies of all required notices and acknowledgments to the Secretary concerned.] * * * (c) Civil Penalties for Violation. -- (1) Exports. -- * * * such Secretary may assess against such person a civil penalty of not more than \$500,000 for each violation, or 3 times the gross value of the unprocessed timber involved in the violation, whichever is greater. * * * (d) Administrative Remedies. -- (1) Debarment. -- * * * from entering into any contract for the purchase of unprocessed timber from Federal lands for a period of not more than 5 years.

"Sec. 493. Definitions. For purposes of this title: (1) The term "acquires" means to come into possession of, whether directly or indirectly, through a sale, trade, exchange, or other transaction, and the term "acquisition" means the act of acquiring." 104 Stat. 714-723 (1990).

has passed out of Federal ownership. Appellant is therefore left without a practical remedy, because the only relief available to the Board, revocation of the exchange, would not satisfy the demand made on appeal. Oregon Cedar argues that the appeal is not moot because the possibility exists that future disputes occurring under FRCSRA will raise the same substantive issues as this case, and therefore seeks an opinion from the Board concerning the effect of the export prohibition appearing in the prior appropriations acts.

The Board does not automatically dismiss every case where the challenged action has taken place. The dismissal of a particular appeal may not be warranted under circumstances where the appeal presents a recurring issue and dismissal of the appeal would tend to prevent substantial issues from ever being reviewed. Southern Utah Wilderness Alliance, 114 IBLA 326, 329 (1990); Southern Utah Wilderness Alliance, 100 IBLA 63, 67 (1987). Indeed, an appeal cannot be dismissed where the issues are capable of repetition and failure to address them will cause the issues to evade review. Southern Utah Wilderness Alliance, 111 IBLA 207 (1989).

Oregon Cedar points out that, before the BLM decision was put into effect, counsel had agreed that whether the case was moot would not be raised in argument before the Board. This agreement was observed, and neither party has raised the question, although both have responded to our inquiry concerning the effect of the execution of the decision. Because mootness is a jurisdictional issue, it cannot be negotiated away by the parties to the controversy. The Board is the arbiter of its own jurisdiction, and attorneys of the Solicitor's Office, in representation of BLM, may not create rights in an appeal. See Phelps Dodge Corp., 72 IBLA 226, 229 (1983); Texas Oil & Gas Corp., 58 IBLA 175, 88 I.D. 879 (1981). Moreover, the Board has full authority to review the entire record when making a decision, and our review is not limited to the theories upon which the parties have proceeded. Shiny Rock Mining Corp. (On Reconsideration), 77 IBLA 262 (1983); appeal dismissed Shiny Rock Mining Corp. v. United States, Civ. No. 84-643 (D. Ore. June 13, 1984), adopting Magistrate's Recommendations, 629 F. Supp. 877 (D. Ore. 1986) (summary judgment for defendant United States). Accordingly, the Board is not prevented from considering the mootness issue sua sponte.

The Board has borrowed its test for mootness from the courts, whose opinions observe that it is difficult to establish that a case has become moot. See, e.g., County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). The Supreme Court has held that even in cases where it appears there can no longer be any effective relief granted, that if there remains some likelihood that a case is "capable of repetition, yet evading review" there should be a reasonable expectation or demonstrated probability, and not mere physical or theoretical possibility, that the same controversy will be repeated involving the same complaining party. Murphy v. Hunt, 455 U.S. 478 (1982); James v. U.S. Dept. of Health & Human Services, 824 F.2d 1132, 1136 (D.C. Cir. 1987).

We find the prospect that we will find Oregon Cedar again before the Board in this situation is extremely slight. Oregon Cedar was not a party to the case until it protested to BLM, nor has it demonstrated how it was directly affected by the decision. 3/ Assuming for purposes of decision that the company was adversely affected by the exchange, however, we conclude there is no prospect that such a transaction will evade review. We conclude there is no demonstrated probability that the issue in this appeal, that is, whether BLM can proceed with a land exchange involving considerable amounts of harvestable timber without considering the export restriction appearing annually in the appropriation acts, will be repeated. The issue lacks the necessary element that it be capable of nearly certain repetition. Moreover, any review here of the underlying general questions argued by the parties in this case about how appropriations may be spent by BLM in view of the prohibition on exportation of western timber appearing in the appropriations acts would have relatively little precedential significance after passage of FRCSRA, which has changed the focus and foundation of the prohibition.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed as moot.

Franklin D. Arness
Administrative Judge

I concur:

David L. Hughes
Administrative Judge

3/ The parties' stipulation that Oregon Cedar has standing to appeal does not allow as to ignore the requirements of 43 CFR 4.410(a), under which a party must be "adversely affected" by BLM's decision in order to appeal.